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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. VICTOR SARCO CALDERON, Defendant and Appellant.	H030215 (Santa Clara County Super.Ct.No. CC476590)

A jury convicted defendant of four counts of aggravated sexual assault (Pen. Code, § 269)[1] against Y. D., his very young daughter. The assaults consisted of rape, sodomy, sexual penetration with a foreign object, and oral copulation. The trial court sentenced defendant to 60 years to life in prison, consisting of four consecutive terms of 15 years to life imprisonment for each conviction, and ordered him to pay restitution.

On appeal, defendant maintains that he was incompetent to stand trial, and that the trial court erred in permitting in-custody statements he made to a social worker following his arrest to be introduced in evidence against him.

We find no error requiring reversal, and therefore affirm the judgment.

[1] All further statutory references are to the Penal Code unless otherwise specified.

FACTS

The facts are relevant only to the second issue raised on appeal, and will be set forth in our discussion of that issue as needed. In brief, Y. D., age five at the time, told some older children that defendant, her father, had performed a variety of sexual acts on her. The police were alerted and defendant was arrested. As the police pursued their investigation of defendant following his arrest, a social worker interviewed defendant in the county jail. He told the social worker that Y. D. had acted seductively toward him since age two and would initiate sexual contact. He was tried after turning down a plea agreement offer.

DISCUSSION

I. *Defendant's Competence to Stand Trial*

Defendant contends that he met his burden to show there was no substantial evidence he was competent to stand trial. We do not agree.

A. *Facts and Procedural Background*

Before trial began, the trial court declared a doubt about defendant's competence to stand trial and suspended the criminal proceedings in order to have defendant undergo a psychological evaluation.

J. Arturo Silva, M.D., a psychiatrist, submitted a report to the trial court. Because defendant submitted nothing in opposition, Dr. Silva's evaluation was the only basis for deciding the issue of defendant's competence. Under this posture of the case and in light of Dr. Silva's findings, which we will set forth below, defendant cannot prevail on his claim.

Defendant had refused to meet with Dr. Silva, so the psychiatrist relied on a psychological report by Shelley Coate, two brief telephone conversations with Mark Brujera, Ph.D., Santa Clara County jail medical records, San Jose Police Department records, and the felony complaint.

Dr. Silva concluded: "Available information indicates that the defendant was aware of the child molestation charges against him. [He] presented with a recent history of psychiatric assessments and hospitalization during his current incarceration. Available information indicates that the defendant was diagnosed with an Adjustment Disorder. I found insufficient information in support of a major Psychiatric Disorder. The available information suggests that the defendant does no[t] suffer from a Mental Disorder[, nor is he] exhibiting behavior that would prevent the defendant from being able to understand the nature of the proceedings taken against him. . . .

"There is evidence that the defendant has a current mistrust of the judicial system including his attorney. Such mistrust may qualify as a paranoid ideation. However, I didn't find any evidence that the defendant's paranoid ideation is consistent with delusional paranoia. The available information suggests that the defendant does no[t] suffer from a Mental Disorder[, nor is he] exhibiting behavior that would prevent the defendant from being able to assist counsel in the conduct of a defense in a rational manner. . . .

"It is true that the defendant may refuse to cooperate with his attorney. If the defendant refuses to cooperate with this attorney, the available information indicates that the defendant's reluctance to cooperate with his attorney or participate appropriately in the legal process is likely to be explainable via nonpsychiatric reasons. . . .

" [¶] . . . [¶] . . . The available information does no[t] support the notion that the defendant suffers from a Mental Disorder that may cause him to become incompetent to stand trial. The evidence available to this examiner does not support the impression that the defendant has displayed behavior of such quality and degree that would suggest that he is incompetent to stand trial." (Original underscore deleted.)

B. *Discussion*

A criminal defendant is presumed competent unless he or she proves otherwise by a preponderance of the evidence. (§ 1369, subd. (f).) Under the Fourteenth Amendment

to the United States Constitution and state law, a mentally incompetent defendant may not be subjected to trial. (*People v. Rogers* (2006) 39 Cal.4th 826, 846.) The standard for competence is well-settled. "A defendant is incompetent to stand trial if he or she lacks ' "a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and . . . a rational as well as a factual understanding of the proceedings against him." ' " (*Id.* at pp. 846-847.)

"On appeal, the reviewing court determines whether substantial evidence, viewed in the light most favorable to the verdict, supports the finding on competency. [Citation.] Evidence is substantial if it is reasonable, credible and of solid value. [Citation.]" (*People v. Dunkle* (2005) 36 Cal.4th 861, 885.) " 'When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination . . . .' " (*People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 681, original italics deleted [speaking of an inquiry into fitness to be tried in juvenile court].)

Defendant did not introduce any evidence controverting Dr. Silva's conclusions. He makes no claim on appeal that Dr. Silva's conclusions do not constitute substantial evidence. Before this court, he merely points to places in the record in which, he urges, the record shows he exhibited strange or irrational behavior. He concludes that his "conduct before and during trial belies Dr. Silva's conclusions." In essence, he invites us to substitute our judgment for Dr. Silva's and perform a psychiatric reevaluation of his competence from afar.

Clearly, we cannot do so. Instead, we properly limit ourselves to deciding whether Dr. Silva's evaluation constituted substantial evidence to sustain the trial court's ruling. Plainly, it did. We need not requote the psychiatrist's conclusions—it suffices to state that Dr. Silva laid out reasons that defendant had the ability to consult with his lawyer

with the required degree of rational understanding and had a rational and factual understanding of the proceedings against him. Dr. Silva was a qualified psychiatrist, and he relied on the evidence available to him, which, although it did not include an interview with defendant, was nevertheless of sufficiently solid value. Defendant offers no authority for the proposition that a professional evaluation of a criminal defendant's competence must include an interview with the defendant before a trial court may rely on it. Nor are we aware of such a requirement. (Cf. *People v. Stankewitz* (1990) 51 Cal.3d 72, 89, fn. 5 ["Even where the defendant refuses to be interviewed, the court-appointed experts may testify as to their observations of the defendant, and the trial court may consider other evidence, including its own observations and the defendant's in-court demeanor"].)

Accordingly, we reject defendant's claim.

II. *Denying Motion to Exclude Evidence of Defendant's In-Custody Statements to Social Worker*

Defendant contends that the trial court erred in denying his motion to exclude from evidence inculpatory statements he made to a Santa Clara County Department of Family and Children's Services social worker after being taken into custody for allegedly abusing Y. D. We conclude that the state has met its burden of showing that any error was harmless beyond a reasonable doubt.

A. *Facts*

Over defendant's objection on the ground that under *Estelle v. Smith* (1981) 451 U.S. 454, admitting his statements, uncautioned by an advisement of his rights to silence and to counsel, would violate his Fifth Amendment right not to be compelled to incriminate himself (see *Miranda v. Arizona* (1966) 384 U.S. 436), Melissa Covarrubias, a social worker for Santa Clara County, testified before the jury that she interviewed defendant at the county's Elmwood Jail within 24 hours following defendant's arrest and Y. D.'s removal from defendant's home to a children's shelter because of the authorities'

belief that, in light of the allegations against defendant, Y. D. required dependency services. Defendant stated, among other things, that Y. D. had been seducing him since she was two years old, and he described in detail sexual contacts that she would purportedly initiate. In a second interview, apparently also conducted in the county jail about five weeks later, defendant told Covarrubias that Y. D. had desired sexual contact with him since she was one week old. The social worker did not ask defendant whether he wished to waive his *Miranda* rights to silence and to counsel before interviewing him. A number of hours before the first interview, however, and a number of weeks before the second, the police had given defendant his *Miranda* rights and he had waived them and spoke freely about his conduct with Y. D.

B. *Discussion*

Our Supreme Court's recent decision in *People v. Pokovich* (2006) 39 Cal.4th 1240, addressing a different but related question, suggests that the trial court erred in denying defendant's motion to exclude from evidence his statements to the social worker. Further support for such a conclusion comes from Welfare and Institutions Code section 355.1 and cases construing that provision.

In *Pokovich*, the court addressed whether a criminal defendant could be impeached during his criminal trial by statements he made to two court-appointed mental-health professionals—a psychiatrist and a psychologist—assigned to evaluate him for competence to stand trial. (*People v. Pokovich, supra,* 39 Cal.4th at pp. 1242-1244.) The court introduced the subject by remarking that "competency proceedings are initiated by the trial court, not the defendant. The defendant cannot refuse to undergo a psychiatric examination and cannot waive the right to a trial on the issue of competency. [Citation.] Because our statutory scheme governing competency to stand trial does not give the defendant the right to refuse to submit to the competency examination, it implicates a defendant's federal constitutional privilege against self-incrimination. (U.S. Const., 5th Amend.)." (*Id.* at p. 1245.)

Pokovich emphasized, however, that although a competence examination is required, criminal defendants are not compelled to make any statements during the examination. They may remain silent. (*People v. Pokovich*, *supra*, 39 Cal.4th at p. 1249.) Nevertheless, that fact did not "end the inquiry of whether [such statements] may be used to impeach a defendant's testimony" (*ibid.*).

"Pertinent here is the Court of Appeal's decision in *Tarantino v. Superior Court* (1975) 48 Cal.App.3d 465 (*Tarantino*). There, the court balanced the state's need for accurate competency evaluations against the need for safeguarding the accused's constitutional right against self-incrimination. *Tarantino* judicially declared a rule of immunity for statements made by a defendant to a mental health professional during a competency examination: '[N]either the statements of [the defendant] to the psychiatrists appointed under section 1369 nor the fruits of such statements may be used in trial of the issue of [the defendant's] guilt, under either the plea of not guilty or that of not guilty by reason of insanity.' [Citation.]

"Six years later, in *Estelle v. Smith* (1981) 451 U.S. 454 (*Estelle*), the United States Supreme Court held that a 'criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding' unless the defendant had been informed of and waived his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). (*Estelle*, *supra*, 451 U.S. at pp. 468-469.) If the defendant invokes his rights and refuses to answer questions of the mental health professional conducting the competency examination, 'the validly ordered competency examination nevertheless could . . . proceed[ ] upon the condition that the results would be applied solely for that purpose,' that is, solely for the purpose of the competency examination. (*Id*. at p. 469.)

"The next year, this court in *People v. Arcega* (1982) 32 Cal.3d 504, 522, adopted the immunity rule the Court of Appeal had articulated in *Tarantino*, *supra*, 48 Cal.App.3d

at page 470. Immunity is necessary, we said, to 'ensure that an accused is not convicted by use of his own statements made at a court-compelled examination,' and to foster 'honesty and lack of restraint on the accused's part at the examination and thus promote accuracy in the psychiatric evaluation.' [Citations.]

"Those decisions establish that the Fifth Amendment's privilege against self-incrimination applies to competency examinations, and therefore a defendant's statements made during such an examination may not be used by the prosecution to prove its case-in-chief as to either guilt or penalty." (*People v. Pokovich*, *supra*, 39 Cal.4th at pp. 1245-1246.)

As in *Pokovich*, defendant had no right to bar the state from inquiring into the matter at hand, in this case his parental fitness. (See *In re Joanna Y.* (1992) 8 Cal.App.4th 433, 441 [referring to "court-ordered psychological evaluation"]; see generally Welf. & Inst. Code, § 300 et seq.; cf. *id*., § 300, foll. subd. (j) [barring unnecessary disruptions of the family or improper intrusions into the family's life].) Defendant does not argue that he was required to answer the social worker's questions. (See *In re Corey A.* (1991) 227 Cal.App.3d 339, 343 [mother refused to speak with social worker]; cf. *In re Baby Boy V.* (2006) 140 Cal.App.4th 1108, 1111 [court ordered mother to give names of possible fathers of minor to social worker].) But as explained, in *Pokovich*, the court relied on the rule that because a defendant cannot refuse to undergo a competence examination, "it implicates a defendant's federal constitutional privilege against self-incrimination" (*People v. Pokovich*, *supra*, 39 Cal.4th at p. 1245) notwithstanding that the defendant is not required to say anything.

In those circumstances, *Pokovich* undertook a constitutional balancing test to determine the scope of the right to exclude the extrajudicial inculpatory statements from evidence. It balanced "the policy interest in deterring and exposing perjury against the policy interest in preserving and enhancing the reliability of mental competency evaluations." (*People v. Pokovich*, *supra*, 39 Cal.4th at p. 1250.)

Examining this case under a similar balancing test, we observe that if exercising the right not to speak to a social worker about one's children's welfare were the general practice, it could come at a high cost to the defendant, the minor, and society.

From the point of view of the criminal defendant, the cost of not answering the social worker's questions would be great, because refusing to speak to the social worker could lead to the loss of parental rights. (See *In re S.C.* (2006) 138 Cal.App.4th 396, 407 [in part because mother refused to speak with social worker without counsel present, agency filed dependency petition]; *In re Fred J*. (1979) 89 Cal.App.3d 168, 173, 179-181 [parent's refusal to speak to social worker supported judgment to take minors from mother for ultimate placement in a foster home, group home, or dependent children's facility].) The minor and society also have an interest in having the facts of a dependency case investigated as thoroughly and meticulously as possible. If " 'honesty and lack of restraint on the accused's part at the examination . . . promote accuracy in the psychiatric evaluation' " (*People v. Pokovich*, *supra*, 39 Cal.4th at p. 1246), an attribute that helped lead to a state law rule immunizing statements made during a competence examination (*id*. at pp. 1245-1246), the value of a criminal defendant's honesty and lack of restraint is at least as important when it involves a minor's welfare.

Moreover, not only a personal benefit is involved, but also the protection of a right of constitutional dimension. For decades, state and federal cases have stressed an individual's constitutionally protected interest in family ties and child-rearing. "[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." (*Lawrence v. Texas* (2003) 539 U.S. 558, 574.) "[A] parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.' " (*Lassiter v. Department of Social Services* (1981) 452 U.S. 18, 27; see also *Elk Grove Unified School Dist. v. Newdow* (2004) 542 U.S. 1 [mentioning

California law's recognizing family privacy and parental autonomy as protected rights]; *Hill v. National Collegiate Athletic Assn*. (1994) 7 Cal.4th 1, 30, 31.)

Applying a version of the balancing test announced in *People v. Pokovich*, *supra*, 39 Cal.4th at page 1253, to these facts, we might well conclude that defendant's theoretical interest in preserving his relationship to his daughter (a relationship that was, of course, horrendously abused in this case and unlikely to be preserved) outweighed the "risk to the truth-seeking function" (*ibid.*) that barring the social worker's testimony would present. (Cf. *Griffin v. California* (1965) 380 U.S. 609, 614 ["comment on the refusal to testify" violates the Fifth Amendment to the federal Constitution: "It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly"].)

In response to our request to the parties for supplemental briefing, defendant brought to our attention Welfare and Institutions Code section 355.1, subdivision (f), which provides: "Testimony by a parent, guardian, or other person who has the care or custody of the minor made the subject of a proceeding under Section 300 shall not be admissible as evidence in any other action or proceeding." With commendable candor, the People acknowledge in their supplemental brief that section 355.1 and the cases applying it suggest that the social worker's testimony should not have been admitted. We agree that such is the import, if not the language strictly construed, of section 355.1.

As the People explain, the word "testimony" in section 355.1, subdivision (f), strictly speaking, refers to oral testimony in court. (See *In re Jessica B.* (1989) 207 Cal.App.3d 504, 518-519.) *Jessica B.* held, however, that the "California Constitution requires that a person proceeding simultaneously in the criminal courts for child abuse and the juvenile court regarding a dependency of the abused minor should not only be granted use immunity for his or her testimony at dependency proceedings that constitutes an admission to the acts at issue in the criminal case against him or her, but also for such statements made during court-ordered therapy. . . . [S]uch an immunity is essential to the

constitutional privilege against self-incrimination and facilitates the goal of protecting the best interest of the minor . . . ." (*Id*. at p. 521.) In *In re Joanna Y., supra*, 8 Cal.App.4th at page 441, this court stated that "the holding in *Jessica B.* should also apply to statements made during a court-ordered psychological evaluation." In *In re Lamonica H*. (1990) 220 Cal.App.3d 634, the court decided that "any admissions [the father] makes during the course of treatment ordered as part of the reunification plan would be immune from use in criminal proceedings which might be brought against him." (*Id*. at p. 650, fn. omitted.)

Notwithstanding the foregoing observations, this case does not require us to definitively resolve the question whether any federal constitutional or state-created right exists that allows a criminal defendant to be able to exclude from evidence statements made to a social worker concerning the welfare of the defendant's children.[2]

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[2] Insofar as defendant claims that his statements should have been excluded because he was not readvised of his *Miranda* rights before he spoke to the social worker, we reject the claim for the reasons similar and in addition to those our Supreme Court articulated in *People v. Pokovich*, *supra*, 39 Cal.4th at pages 1253-1254: it would be a roundabout way of conferring the same protection, and that protection would be conferred at a cost to the minor and society, as people in defendant's situation might decline to speak to the social worker about their children's welfare. The "more direct" (*id*. at p. 1254) remedy that would be afforded to defendant if we definitively concluded that *Pokovich* and analogous Court of Appeal decisions apply to his case would fully protect his rights.

Moreover, given that the police read defendant his *Miranda* rights when questioning him, resolving whether the initial *Miranda* advisement precluded requiring the social worker to readvise defendant on both occasions would be a laborious analytical undertaking. "A *Miranda* warning is not required before each custodial interrogation; one warning, if adequately and reasonably contemporaneously given, is sufficient." (*People v. Quirk* (1982) 129 Cal.App.3d 618, 626-627, citing *People v. Johnson* (1969) 70 Cal.2d 469.) Regarding contemporaneousness and other circumstances to be considered on a claim that readvisement was required, the relevant authorities include *People v. Smith* (2007) 40 Cal.4th 483, 504; *People v. Mickle* (1991) 54 Cal.3d 140, 170; *U.S. v. Rodriguez-Preciado* (9th Cir. 2005) 399 F.3d 1118, 1128-1129; and *Quirk*, *supra*, at pages 629-630.

(continued)

In *People v. Pokovich*, *supra*, 39 Cal.4th at pages 1254-1255, the court applied the *Chapman* standard of prejudice to the related question before it. (*Chapman v. California* (1967) 386 U.S. 18, 24.) We will do likewise, i.e., we will determine " 'beyond a reasonable doubt that the error complained of did not contribute to the verdict.' " (*Pokovich*, *supra*, 39 Cal.4th at pp. 1254-1255.) " 'To say that an error did not contribute to the ensuing verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.' [Citation.] Thus, the focus is what the jury actually decided and whether the error might have tainted its decision. That is to say, the issue is 'whether the . . . verdict actually rendered in *this* trial was surely unattributable to the error.' " (*People v. Neal* (2003) 31 Cal.4th 63, 86.) "The State bears the burden of proving that an error passes muster under [the *Chapman*] standard" of prejudice. (*Brecht v. Abrahamson* (1993) 507 U.S. 619, 630.)

We are able to conclude beyond a reasonable doubt that the verdicts rendered against defendant were surely unattributable to any error in admitting the social worker's testimony.

Y. D., though only six years old at the time of trial, directly testified about defendant's sexual abuse of her. Y. D., using a child's simple language, testified that defendant had penetrated her vagina with his finger, orally copulated her, and sodomized her, though she did not recall telling a police officer that defendant had raped her. She denied, in essence, doing anything to entice him. Y. D.'s two older playmates, who were perhaps 10 to 11 and 12 to 13 years old respectively when Y. D. told them about

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We would also have to consider the distinguishing rule that "[u]nlike criminal trials, the primary purpose of dependency hearings is to protect the child, not prosecute the parents." (*In re Corey A.*, *supra*, 227 Cal.App.3d at p. 346.) In *Pokovich* the competence hearing, though not a criminal proceeding, was intertwined with a criminal prosecution and its resolution bore important consequences in determining the defendant's criminal liability. We need not and should not undertake those inquiries unnecessarily.

defendant's crimes, testified about the statements she made to them, which included descriptions of being raped and sodomized. An emergency response social worker testified that Y. D. told her she had been raped and possibly sodomized. Defendant, after being given his *Miranda* rights, had given the police statements that included information of a character similar to that of the information he provided to the social worker. Evidence of those statements was introduced before the jury, namely, that Y. D. acted seductively toward him starting at age two, that they engaged in oral copulation, and, in one possible interpretation of defendant's confession, that he sexually penetrated her vagina and anus following her initiative. A letter defendant wrote to his daughter in which he apologized for raping her was read to the jury. The foregoing evidence solidly established defendant's guilt of each charge. We conclude beyond a reasonable doubt that the verdicts rendered against defendant were surely unattributable to any error in admitting the social worker's testimony. (*People v. Neal*, *supra*, 31 Cal.4th at p. 86; see *People v. Pokovich*, *supra*, 39 Cal.4th at pp. 1254-1255.)

DISPOSITION

The judgment is affirmed.

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Duffy, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P.J.

_____
McAdams, J.

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